No. 00-337

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

LEO HISE and JACK ISCH, individually and as representatives of a class of others similarly situated,

Petitioners,

—v.—

PHILIP MORRIS INCORPORATED (a Virginia corporation), R.J. REYNOLDS TOBACCO COMPANY (a New Jersey corporation), BROWN & WILLIAMSON TOBACCO CORPORATION (a Delaware corporation), and THE LIGGETT GROUP D/B/A LIGGETT AND MYERS TOBACCO COMPANY (a Delaware Corporation),

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) bars a claim for antitrust damages brought by a putative class of consumers against manufacturers whose products are available for sale only through third-party distributors and retailers.

2) Whether a defendant's conduct in negotiating and executing an agreement to settle lawsuits brought by state officials is protected from antitrust liability by the *Noerr-Pennington* doctrine.

3) Whether a multi-state litigation settlement among a group of private defendants and forty-six states, the District of Columbia and five United States territories can constitute an unconstitutional interstate compact under Article I, Section 10 of the United States Constitution, and whether such an argument may be raised in this Court when it was not alleged in the complaint.

4) Whether a district court may grant summary judgment for the defendants after assuming all facts alleged in the complaint to be true and undisputed, converting a motion pursuant to Federal Rule of Civil Procedure 12(b)(6) into one for summary judgment under Federal Rule of Civil Procedure 56 and providing both sides the opportunity to file supplemental evidence in support of and in opposition to the motion.

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

All parties to the proceeding in the Tenth Circuit are listed in the caption on the cover of this Brief in Opposition. Pursuant to Supreme Court Rule 29.6, Respondents identify the following parent corporations and publicly held corporations owning 10 percent or more of Respondents' stock:

Philip Morris Incorporated:
Philip Morris Companies, Inc.

R.J. Reynolds Tobacco Company:
R.J. Reynolds Tobacco Holdings, Inc.

Brown & Williamson Tobacco Corporation:
BATUS Tobacco Services, Inc.
BATIC, Inc.
BATUS Holdings, Inc.
Louisville Securities, Ltd.
British-American Tobacco (Holdings), Ltd.
BAT Industries, p.l.c.
British American Tobacco (1998), Ltd.
British American Tobacco, p.l.c.

Lorillard Tobacco Company:
Loews Corporation
Lorillard, Inc.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the United States District Court for the Northern District of Oklahoma is reported at 46 F. Supp. 2d 1201, and is reproduced in the Appendix ("App.") to the petition for writ of certiorari filed by Petitioners, at page 1. The opinion of the United States Court of Appeals for the Tenth Circuit is unreported and is reproduced at App. 20.

Statement of Jurisdiction

The court of appeals entered its judgment on February 17, 2000. A timely petition for a writ of certiorari was filed in this Court. This Court has jurisdiction to review the petition under 28 U.S.C. § 1254(1).

Statutory Provisions and Rules Involved

The relevant statutes and rules are fully set forth in the petition for writ of certiorari. For the reasons stated below, Respondents contend that neither the Interstate Compact Clause of Article I, Section 10 of the Constitution nor Article IV, Section 4 of the Constitution, are properly before this Court, because Petitioners' complaint did not allege a violation of either provision.

Statement Of The Case

In 1998, the Respondent manufacturers of tobacco products entered into a Master Settlement Agreement ("MSA") with forty-six states, the District of Columbia, and five United States territories to resolve dozens of lawsuits that had been brought against Respondents by state and territorial governments throughout the United States. This case is one of several subsequent lawsuits challenging the MSA on antitrust and constitutional grounds. To date, every court to consider such a challenge to the MSA has concluded that these lawsuits have no merit. The opinions of the district court and the Tenth Circuit are fully in accord with this Court's precedent and with the rulings of every other court to consider similar challenges to the MSA.

1. *Factual Background.* In November 1998, Respondents entered into the MSA with 52 jurisdictions that had commenced lawsuits against defendants seeking monetary, equitable and injunctive relief (the "State Lawsuits"). The MSA represents a comprehensive and final settlement of the State Lawsuits. The MSA required the settling states to dismiss, with prejudice, certain claims against Respondents. In exchange, the MSA required Respondents, *inter alia,* to fund a program of public

education, and to make payments—totaling more than $200 billion—to the settling states and territories. The MSA set forth detailed formulas and instructions governing the timing and amounts of such payments. The MSA provided that its implementation would be coordinated and overseen by the National Association of Attorneys General ("NAAG") and that the court to which the MSA was presented for approval would retain exclusive jurisdiction for enforcement purposes.

On November 23, 1998, the Oklahoma Attorney General executed the MSA. On December 1, 1998, the Oklahoma District Court for Cleveland County entered a Consent Decree and Final Judgment in Case No. CJ-96-1499-L(H) (the "Oklahoma Action"). In approving the Consent Decree, the court found that entering into the MSA "is in the best interests of the State of Oklahoma." Pursuant to the Consent Decree and MSA, the District Court for Cleveland County, on December 1, 1998, entered an agreed order dismissing the Oklahoma Action with prejudice.

2. *Proceedings In The Trial Court.* Petitioners' complaint was filed on December 15, 1998. The district court had jurisdiction pursuant to 28 U.S.C. § 1331. Petitioners' complaint alleged that defendants raised the prices of their tobacco products in order to pay the costs associated with the MSA. The complaint specifically alleged three counts. The First Count alleged that Respondents' price increases constituted unlawful price fixing in violation of the Sherman Act, 15 U.S.C. § 1. The Second Count alleged that Respondents' conduct in passing on to consumers the costs of complying with the MSA deprived Petitioners and other consumers of a property interest without due process of law in violation of the Fourteenth Amendment. The Third Count alleged that, by entering into the MSA, Respondents "presumed to assume regulations and governance of the manufacture, interstate trade and consumption of tobacco

products," but failed to identify the law or constitutional provision alleged to have been violated.

Respondents filed a timely motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). On March 17, 1999, the district court issued an order converting the motion to dismiss under Rule 12(b)(6) into a motion for summary judgment under Rule 56. *Hise v. Philip Morris, Inc.*, 46 F. Supp. 2d 1201, 1204 (N.D. Okla. 1999); at 1204, App. 3, 23. The district court's order provided that Respondents would have 15 days to file any supplemental materials in support of their motion, and that Petitioners would have 15 days thereafter to file any supplemental materials in opposition to the motion. *Id.*

Respondents submitted a short supplemental memorandum which argued that summary judgment was appropriate due to Petitioners' failure to allege facts sufficient to state a claim under any of their theories and the absence of evidence to support any of their claims. App. 3. Petitioners also submitted a supplemental memorandum, but the only evidence they offered in opposition to summary judgment was a portion of a statement from a tobacco industry website concerning the 1997 Proposed Resolution of the States' tobacco lawsuits—a proposal which ultimately failed to receive Congressional approval, and which had nothing to do with the MSA. Petitioners did not file an affidavit pursuant to Federal Rule of Civil Procedure 56(f) identifying any discovery they believed necessary to enable them to oppose summary judgment. Indeed, even after the court had converted the motion to dismiss into a motion for summary judgment, Petitioners expressly agreed, in the parties' Joint Case Management Conference Statement, to stay all discovery pending the court's disposition of the summary judgment motion.

On April 29, 1999, the district court granted summary judgment in Respondents' favor. The court held that Petitioners' antitrust claim failed because "defendants' activities, in negotiating the M.S.A. with the several settling states and achieving a settlement agreement with those states, are protected under the *Noerr-Pennington* doctrine as conduct incidental to litigation." *Hise*, 46 F. Supp. 2d at 1206 (citation omitted); App. 9. The district court also concluded that, to the extent Petitioners' antitrust claim sought damages on behalf of consumers of tobacco products, that claim was barred by the "indirect purchaser" rule of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). *Hise*, 46 F. Supp. 2d at 1207; App. 12-13.

The district court also granted summary judgment with respect to Petitioners' constitutional claims. The court held that Petitioners' due process claim failed as a matter of law because consumers have "no recognized property interest in paying a certain sum to a retailer to purchase a tobacco product." *Id.* at 1209; App. 17. As to the Third Count—which Petitioners contended in their brief in opposition to the motion to dismiss was based on Article I, Section 10 of the Constitution—the court found that Petitioners' claim was "plainly frivolous" and unsupported by authority. *Id.* at 1209-10; App. 18-19.

3. *Proceedings In The Court Of Appeals.* In an unpublished opinion, the United States Court of Appeals for the Tenth Circuit affirmed. With respect to the issues of whether Petitioners' antitrust claims were barred by *Illinois Brick* and *Noerr-Pennington* and whether summary judgment should have been granted on the purported claim under Article I, Section 10 of the Constitution, the Tenth Circuit

adopted the district court's opinion in its entirety.[1] The court stated that "[b]ecause the district court issued a well-reasoned decision, thoroughly explaining the reasons for granting summary judgment, . . . we decline to duplicate its analysis here." App. 30. The court of appeals also rejected Petitioners' argument that it was inappropriate for the district court to grant summary judgment rather than offering them an opportunity to amend the complaint. App. 27. Petitioners sought review before the court *en banc*. On March 23, 2000, Petitioners' request for rehearing *en banc* was denied. App. 32.

Reasons For Denying The Writ

The rulings below are consistent with this Court's precedents and raise no issue warranting further review. With respect to Petitioner's antitrust and constitutional challenges to the MSA, there is no conflict of authority requiring resolution by this Court. Every court to consider similar challenges to the MSA has concluded that such challenges have no merit. Similarly, the procedural issues raised by Petitioners involve no conflict of authority and present no important issue of federal law that requires resolution by this Court.

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[1] Petitioners did not challenge on appeal the district court's grant of summary judgment with respect to their due process claim.

I. The Opinions Below Are Fully Consistent With This Court's Precedent And With The Decisions Of Other Courts of Appeals.

A. The Tenth Circuit Properly Held That *Illinois Brick* Bars Antitrust Claims Brought By Indirect Purchasers of Tobacco Products.

In the proceedings below, Petitioners alleged that defendants conspired to raise the prices of their tobacco products in order to pay the costs of the MSA. Both the district court and the Tenth Circuit concluded that, to the extent it seeks damages, Petitioners' antitrust claim is barred as a matter of law by *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

Recognizing the difficulties in apportioning recovery among direct and indirect purchasers, this Court in *Illinois Brick* held that only *direct purchasers* of a product have standing to recover damages in a federal antitrust action. *Id.* at 745-46.[2] Under *Illinois Brick* and its progeny, indirect

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[2] This Court there observed,

> Permitting the use of pass-on theories under § 4 essentially would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge—from direct purchasers to middlemen to ultimate consumers. However appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity

purchasers of the product of an alleged antitrust violator cannot recover for overcharges allegedly imposed on a wholesaler or other direct purchaser. This is true even if the direct purchaser passed on to a subsequent purchaser all or part of the illegally inflated price. *Id.* at 730-31.

Petitioners did not allege that they or the class of persons they purported to represent purchased tobacco products directly from defendants. They alleged only that they are "consumers" of tobacco products. (Pet. at 11; *Hise*, 46 F. Supp. 2d at 1203; App. 1-2, 22). Consumers do not purchase tobacco products directly from Respondents. They may only do so through distributors and retailers. These intermediaries may choose whether or not to pass on all or a portion of the increased price to consumers. Thus, this case presents precisely the complex problems of allocation that led to the decision in *Illinois Brick*.

Here, as in the courts below, Petitioners assert that they are entitled to an exception to the *Illinois Brick* rule because this case involves an alleged "excise" or "tax" which is passed on to consumers in the form of higher prices. Pet. at 12-13. They also contend that they were directly "targeted" by Respondents and the state attorneys general to pay the MSA's costs. Pet. at 16. Even accepting, *arguendo*, these incorrect characterizations of the MSA, this Court's decision in *Kansas v. Utilicorp United Inc.*, 497 U.S. 199 (1990), makes clear that Petitioners are not entitled to such an exception.

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to treble-damages suits and seriously undermine their effectiveness

Illinois Brick, 431 U.S. at 737.

In *Utilicorp*, two states, acting in a *parens patriae* capacity on behalf of residential consumers who purchased natural gas from public utilities, filed suit against natural gas producers in connection with an alleged antitrust conspiracy to inflate natural gas prices. This Court held that *Illinois Brick* precluded the states from suing on behalf of consumers of natural gas, who did not purchase gas directly from the defendants, but only indirectly through the utility companies.

Like Petitioners here, the plaintiffs in *Utilicorp* argued that *Illinois Brick* should not apply because the case involved "regulated public utilities that pass on 100 percent of their costs to their customers." *Utilicorp*, 497 U.S. at 208. This Court rejected the argument that such a case would eliminate the problems of apportionment and multiple liability that *Illinois Brick* sought to remedy, and also cautioned that the creation of new exceptions to *Illinois Brick* is strongly disfavored. *Id.* at 216. Thus, this Court has squarely rejected the argument now urged by Petitioners—that a 100 percent pass-through of increased costs should entitle consumers to an exception to the indirect purchaser rule.

The Tenth Circuit's decision that *Illinois Brick* bars an action for antitrust damages brought by consumers who did not purchase products directly from the defendant is also consistent with the decisions of every United States court of appeals to consider the issue.[3]

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[3] *See, e.g., See SAS of Puerto Rico v. Puerto Rico Telephone Co.*, 48 F.3d 39, 43 (1st Cir. 1995) (citing indirect purchaser rule as one example of court-created limits on antitrust standing); *McCarthy v. Recordex Service, Inc*, 80 F.3d 842, 844 (3d Cir. 1996) (holding that plaintiffs "lack standing to bring a treble damages claim because they are not 'direct purchasers' as required by *Illinois Brick Co.*"); *Laurel Sand & Gravel v. CSX Transportation*, 924 F.2d 539 (4th Cir.

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1991) (indirect purchaser rule barred sand and gravel distributor from seeking damages from railroad); *Free v. Abbott Laboratories*, 176 F.3d 298 (5th Cir. 1999) (in interpreting Louisiana antitrust statutes, court noted that indirect purchasers are barred from bringing suits for damages under federal law); *County of Oakland v. City of Detroit*, 866 F.2d 839 (6th Cir. 1987) (under the indirect purchaser rule, county which purchased sewage services from the city and resold them to consumers was the proper party to bring antitrust action); *In re Brand Name Prescription Drugs Antitrust Litigation*, 186 F.3d 781 (7th Cir. 1999) (indirect purchaser rule barred retail pharmacies from seeking damages from drug manufacturers); *Campos v. Ticketmaster*, 140 F.3d 1166 (8th Cir. 1998) (indirect purchaser rule barred buyers of concert tickets from bringing antitrust action against supplier of ticket distribution services); *Lucas v. Automotive Engineering, Inc*, 140 F.3d 1228, 1234 (9th Cir. 1998) (holding that a plaintiff who had purchased tires from a distributor who in turn purchased the tires from defendant lacked standing under *Illinois Brick*); *Sports Racing Servs., Inc. v. Sports Car Club,* 131 F.3d 874, 883 (10th Cir. 1997) ("The Supreme Court has consistently held that only direct purchasers suffer injury within the meaning of § 4 of the Clayton Act."); *Lowell v. American Cyanamid Co.*, 177 F.3d 1228 (11th Cir. 1999) (*Illinois Brick* denies standing to indirect purchasers, but was inapplicable to vertical price-fixing conspiracy); *Adams v. Pan American World Airways*, 828 F.2d 24, 28 (D.C. Cir. 1987) (*Illinois Brick* "flatly precludes indirect purchasers from bringing antitrust actions in virtually all cases."); *see also In re NASDAQ Market Makers Antitrust Litigation*, 169 F.R.D. 493, 505 (S.D.N.Y. 1996) (citing "bright line rule" against standing for indirect purchasers).

The Third and Ninth Circuit cases relied on by Petitioners are not in conflict with the Tenth Circuit's decision here. Contrary to Petitioners' description, the Third Circuit's decision in *In re Lower Lake Erie Iron Ore Antitrust Litigation*, 998 F.2d 1144 (3d Cir. 1993), did not create an exception to *Illinois Brick*. Rather, the *Lake Erie* court concluded that the plaintiffs in that case had standing to sue under *Illinois Brick*. In *Lake Erie*, the plaintiff steel manufacturers challenged the defendant railroads' alleged conspiracy to delay the implementation of self-unloading technology and otherwise monopolize the transportation of iron ore along lower Lake Erie. The court concluded that the injury to the steel companies—*who were direct customers of the railroads*—was sufficient to satisfy *Illinois Brick*, even though some of the damages the plaintiffs sought to recover consisted of amounts paid to parties other than the railroads as a result of plaintiffs' attempt to avoid the effects of the railroads' attempted monopolization. The *Lake Erie* court expressly cautioned, however, that *Illinois Brick* would bar a suit "by a 'downstream' industry alleging, as was alleged in *Illinois Brick*, that the steel companies had passed on the transportation increase in the price of steel." *Lake Erie*, 998 F.2d at 1169.[4] That is exactly Petitioners' situation. Petitioners are downstream purchasers who complain that defendants passed on the costs of the MSA in the price of

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[4] Indeed, after *Lake Erie*, the Third Circuit applied *Illinois Brick* to preclude antitrust claims brought by indirect purchasers. *See McCarthy v. Recordex Service, Inc*, 80 F.3d 842, 844 (3d Cir. 1996); *see also Kleissler v. US Forest Service*, 157 F.3d 964, 979 (3d Cir. 1998) (citing *Illinois Brick* as preventing "massive multiparty litigations involving many levels of distribution and including large classes of ultimate consumers remote from the defendant").

tobacco products, which were sold to them via distributors and retailers.

The other case on which Petitioners rely, *Amarel v. Connell,* 102 F.3d 1494 (9th Cir. 1997), simply has nothing to do with *Illinois Brick.* Plaintiffs in that case were competitors, not customers, of the defendants. Thus, the indirect purchaser rule was not at issue. The *Amarel* court did not even discuss, much less create an exception to, *Illinois Brick.*

In sum, there is no merit to Petitioners' suggestion that this is a case of "absolute first impression." Pet. at 17. The Tenth Circuit's decision represents a straightforward application of *Illinois Brick* and *Utilicorp* and is consistent with the decisions of every court of appeals to consider similar claims by indirect purchasers.[5]

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[5] Petitioners correctly note that *Illinois Brick* applies only to their claim for damages, not their claim for injunctive relief. However, the district court correctly held that Petitioners' injunctive relief claim was inadequately pled, and in any event, as argued below, the *Noerr-Pennington* doctrine insulates Respondents from liability on both the injunctive relief claim and the damages claim. *Hise*, 46 F. Supp. 2d at 1206-07, 1208; App. 8-11, 14.

B. The Tenth Circuit Correctly Concluded That The *Noerr-Pennington* Doctrine Protects Respondents From Liability Arising Out Of Their Negotiation And Execution Of The MSA.

Grounded in the First Amendment, the *Noerr-Pennington* doctrine allows individuals or businesses to petition the government, free from antitrust liability, regardless of any anticompetitive motive or effect. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135-36 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 669-72 (1965). In *Noerr*, this Court held that Sherman Act liability cannot attach to efforts to associate together to petition the government, regardless of any anticompetitive motivation or effect of such petitioning efforts. *Noerr*, 365 U.S. at 139. This Court reaffirmed the importance of *Noerr*'s First Amendment protection a few years later, stating,

> We conclude that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors.

California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510-11 (1972).

The courts below properly held that, to the extent Petitioners allege Respondents violated federal antitrust laws by entering into the MSA, their claim fails as a matter of law

under *Noerr-Pennington.* This is true for at least two independent reasons. *First,* Respondents' negotiation and execution of the MSA are protected as efforts to utilize the courts as a means to protect their economic interests. *Second,* Respondents' actions in entering into the MSA fall within the immunity provided for negotiations and the resulting contract with governmental officials.

1. The right of petition accorded immunity under *Noerr-Pennington* has been applied to efforts to petition all three branches of government, including the judiciary. *California Motor,* 404 U.S. at 510 ("The right of access to the courts is indeed but one aspect of the right of petition."). Every court of appeals to consider the question has held that *Noerr-Pennington* immunity applies to the defense of legal proceedings, including the joint defense of a lawsuit.[6] Similarly, courts of appeals have consistently held that the decision to accept or reject an offer of settlement is protected as conduct incidental to litigation, and therefore cannot give rise to antitrust liability. *See Columbia Pictures Indus., Inc. v. Professional Real Estate Investors, Inc.*, 944 F.2d 1525, 1528 (9th Cir. 1991) (the decision whether to settle "is conduct incidental to the prosecution of the suit and not a separate and distinct activity which might form the basis for an antitrust liability"); *Campbell v. City of Chicago,* 823 F.2d 1182, 1186 (7th Cir. 1987) (settlement with local government

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[6] *Mir v. Little Co. of Mary Hosp.,* 844 F.2d 646, 649 (9th Cir. 1988); *In re Burlington Northern, Inc.*, 822 F.2d 518, 526 (5th Cir. 1987); *Brunswick Corp. v. Riegel Textile Corp.*, 752 F.2d 261, 272 (7th Cir. 1984), *cert. denied*, 472 U.S. 1018 (1985); *see also Lemelson v. Bendix Corp.,* 104 F.R.D. 13, 18 (D. Del. 1984); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F. Supp. 1100, 1155-57 (E.D. Pa. 1981), *rev'd on other grounds, sub nom. In Re Japanese Elec. Prods.*, 723 F.2d 238 (3d Cir. 1983).

entitled to *Noerr* immunity); *cf. Coastal States Marketing v. Hunt*, 694 F.2d 1358, 1367 (5th Cir. 1983) ("Given that petitioning immunity protects joint litigation, it would be absurd to hold that it does not protect those acts reasonably and normally attendant upon effective litigation.").[7]

The courts below correctly concluded that the *Noerr-Pennington* doctrine provides immunity for Respondents' negotiation and execution of the MSA. Respondents were sued in over forty lawsuits, in which the states and territories sought both damages and equitable relief. To compromise these lawsuits, Respondents entered into the MSA. The MSA was approved by courts in numerous jurisdictions, including Oklahoma. The MSA thus represents both the result of defendants' joint defense of the State lawsuits and, once approved, the product of defendants' petitioning of the states and the judiciary.

2. *Noerr-Pennington* also provides immunity for negotiations and agreements between private parties and the government. The negotiations are protected as efforts to petition the government. *Greenwood Utils. Comm'n. v. Mississippi Power Co.*, 751 F.2d 1484, 1499 (5th Cir. 1985) (efforts to convince government to adopt marketing policy are protected under *Noerr-Pennington*, "for it is such petitioning activity by interested individuals that provides the

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[7] *See also Modesto Irrigation Dist. v. Pacific Gas & Electric Co.*, 61 F. Supp. 2d 1058, 1072 (N.D. Cal. 1999) (holding that acceptance or rejection of settlement offer is protected by *Noerr-Pennington* immunity); *Johnson v. Con-Vey/Keystone Inc.*, 856 F. Supp. 1443, 1448 (D. Or. 1994) (stating that "a decision to accept or reject a settlement offer is conduct incidental to the prosecution of the lawsuit" and that conduct incidental to a suit is protected by *Noerr-Pennington*).

flow of information essential to the proper functioning of our democratic institutions"); *Independent Taxicab Drivers v. Greater Houston Transp. Co.*, 760 F.2d 607, 612-13 (5th Cir. 1985) (applying *Noerr* to "arm's length contractual negotiations" between business entities and public officials); *Budget Rent-A-Car, Inc. v. Hertz Corp.*, 693 F.2d 84, 88 (9th Cir. 1982) (*Noerr* protects rental-car company's efforts to persuade directors of state-operated airport to lease space only to rental-car companies that satisfied myriad restrictive requirements). The contract resulting from such negotiations is similarly entitled to immunity. *Greenwood Utils.*, 751 F.2d at 1505 ("First Amendment petitioning privileges would indeed be hollow if upon achieving a petitioned-for end the petitioner were then subjected to antitrust liability for his success.").

The MSA was a compromise agreement reached between defendants and 52 jurisdictions that were prosecuting lawsuits against defendants. As a result, both defendants' negotiations with the plaintiff states and the resulting contract with those states—the MSA—fall squarely within the protection provided by *Noerr-Pennington.*

Petitioners contend that the courts below erred in applying *Noerr-Pennington* because the State attorneys general supposedly were acting outside the scope of their authority in negotiating the MSA on behalf of the States. *See* Pet. at 18. Petitioners cite no authority in support of this assertion. Apparently, this argument is premised on Petitioners' theory—also unsupported by citation to relevant case law—that the sums paid under the MSA constitute an unlawful "excise" or "tax," which the state attorneys general had no authority to impose. There is no merit to this argument.

The sums to be paid by Respondents pursuant to the MSA are in compromise of claims for *damages*. As the

district court rightly concluded, the *Noerr-Pennington* doctrine "would surely ring hollow if it failed to encompass private entities who, having been sued by one or more states for similar conduct, jointly petition the states in order to achieve a mutually acceptable settlement, designed to reduce the amount of time and expense involved in defending the action." *Hise,* 46 F. Supp. 2d at 1206; App. 9-10.[8] The decision below is in accord with the decisions of other federal courts on this point, and review by this Court is therefore unnecessary.

C. Petitioners Did Not Allege That The MSA Constitutes An Unlawful "Interstate Compact," And In Any Event, There Is No Merit To The Argument.

Petitioners assert that this Court should grant the writ because "the Master Settlement Agreement must fail as an illegal interstate compact prohibited by the United States Constitution, Art. I, § 10...." Pet. at 20. As an initial matter, this argument fails because Petitioners' complaint did not

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[8] Petitioners raise for the first time in this Court the argument that the MSA somehow usurps the state legislatures' power to raise taxes, which allegedly constitutes a violation of Article IV, Section 4 of the Constitution. Pet. at 20. Not only does this claim rest on assertions about the authority of the various attorneys general and state legislations for which there is no evidence in the record, but it was neither raised in nor ruled on by the courts below, and therefore this Court should not consider it. *See, e.g., Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 n.3 (1999).

even allege that the MSA is an unconstitutional "interstate compact." This Court ordinarily does not consider issues that were not properly raised. *See, e.g., Demarest v. Manspeaker*, 498 U.S. 184, 188-89 (1991).[9]

Even if the Court were to consider Petitioners' Compact Clause argument, it has no merit. Petitioners contend that the MSA constitutes "an intrusion upon the sovereignty of the 'non-settling states' and the supremacy of Congress in matters of interstate commerce." Pet. at 22. This argument is frivolous. There is no precedent that supports Petitioners' contention that a multi-state litigation settlement agreement between several individual states, on the one hand, and a group of private defendants, on the other, constitutes an illegal "interstate compact" among the settling states.

This Court has held that the Compact Clause does not prohibit all agreements or contracts among states, but rather was designed to prevent the formation of "confederations of states to the detriment of the welfare of the Union as a

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[9] The Complaint did not contain any allegation that Respondents had violated Article I, Section 10 of the Constitution. This argument was made for the first time in Petitioners' briefs before the district court. Specifically, they argued that by entering into the MSA with the states, Respondents entered into an unlawful "confederation" in violation of Article I, Section 10, which provides that "[n]o State shall enter into any Treaty, Alliance, or Confederation." Apparently, their theory was that by entering into the MSA, Respondents, along with the state attorneys general, sought to bypass the State legislatures and Congress and establish an outlaw government or "Confederation" within the territory of the United States. The district court properly rejected this argument as "plainly frivolous." *Hise*, 46 F. Supp. 2d at 1210; App. 18-19.

whole." *Northeast Bancorp, Inc. v. Board of Gov. of Fed. Res. Sys.*, 472 U.S. 159, 174-75 (1985). Prior decisions have made it abundantly clear that the Compact Clause has no application to agreements such as the MSA, which do not purport to confer on the states any additional powers beyond those they already possess.

In *United States Steel Corp. v. Multistate Tax Commission,* 434 U.S. 452, 473 (1978), this Court held that a multistate compact does not violate the Compact Clause when it "does not purport to authorize member States to exercise any powers they could not exercise in its absence." *United States Steel* controls the outcome here. Because each settling state plainly could have entered into its own, separate settlement agreement with the tobacco manufacturers, the settling states did not exercise any powers in entering the MSA that they could not exercise independently. *See PTI, Inc. v. Philip Morris Incorporated*, 100 F. Supp. 2d 1179, 1198 (C.D. Cal. 2000) ("The fact that the states acted collectively to settle their disputes with the participating manufacturers . . . does not create a violation of the Interstate Compact Clause."). Thus, even if the Compact Clause issue were properly before this Court, the decisions below are fully consistent with this Court's Compact Clause precedents.

D. The District Court's Summary Judgment Procedures Were Entirely Proper, Raise No Conflict Of Authority, And Present No Important Federal Question.

Petitioners object to the summary judgment procedure adopted by the district court. Pet. at 23-26. They contend this Court should grant a writ of certiorari because Respondents' summary judgment motion did not contain a

section of separately numbered undisputed facts, as required by the local rules of the United States District Court for the Northern District of Oklahoma. As the Tenth Circuit expressly held, App. 27, there was nothing improper about the district court's summary judgment procedure in this case, and nothing about that procedure warrants further review by this Court.

Under *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), a district court has power to enter summary judgment on its own motion "so long as the losing party was on notice that she had to come forward with all of her evidence." *Id.* at 326 (citations omitted). In this case, the district court provided such notice. Pursuant to Fed. R. Civ. P. 12(b), the court issued an order informing the parties of its intention to convert Respondents' Rule 12(b)(6) motion to dismiss into a motion for summary judgment and inviting the parties to submit any relevant evidence or other materials in support of or opposition to the motion.

In response to the district court's order, Respondents filed a supplemental submission stating that, even if treated as a Rule 56 motion for summary judgment, their motion to dismiss should still be granted because Petitioners' claims fail assuming the facts alleged in the complaint to be true. Thus, Respondents' motion was based solely on the facts alleged in the complaint and the provisions of the MSA, which had been attached to their original motion to dismiss with a request for judicial notice.

It is immaterial that these undisputed facts were not separately identified in numbered paragraphs. Respondents' initial motion to dismiss and their supplemental submission clearly identified the undisputed facts on which the motion was based. This was more than sufficient to meet Respondents' summary judgment burden of "'showing' — that is, pointing out to the district court — that there is an

absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325.[10]

Petitioners were given an opportunity to submit evidence in opposition to the motion, or alternatively, to file an affidavit under Federal Rule of Civil Procedure 56(f) identifying any further discovery that they believed necessary to oppose the motion. They did neither. Instead, Petitioners filed a supplemental submission containing as their sole "evidence" in opposition to summary judgment a portion of a statement from a tobacco industry website concerning the 1997 Proposed Resolution of the tobacco litigation which failed to receive Congressional approval.

On this record, Petitioners have no legitimate basis to complain that the district court's summary judgment procedures were improper. Moreover, the Tenth Circuit's decision that summary judgment was appropriately granted based solely on the MSA and the facts alleged in the complaint raises no conflict of authority and presents no important federal issue requiring review in this Court.

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[10] Because Petitioners bore the burden of proof on all elements of their claims, Respondents were not obligated to present any affidavits or other evidence in support of their motion. As this Court held in *Celotex*:

> [W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the "pleadings, depositions, answers to interrogatories, and admissions on file." Such a motion, whether or not accompanied by affidavits, will be "made and supported as provided in this rule,"

Celotex, 477 U.S. at 324.

II. Consistent With The Courts Below, Every Court To Consider Antitrust And Constitutional Challenges To The MSA Has Concluded That Such Challenges Lack Merit.

As shown above, the Tenth Circuit's rulings in this case present no conflict with the decision of any federal court of appeals. Respondents further note that the decisions of the district court and the court of appeals in this case are consistent with every other court in the nation to consider antitrust and constitutional challenges to the MSA. To date, the courts have uniformly held that such challenges lack merit.

In *PTI, Inc. v. Philip Morris Incorporated,* 100 F. Supp. 2d 1179 (C.D. Cal. 2000), the district court dismissed antitrust and constitutional challenges to the MSA brought by plaintiffs in the business of cigarette re-entry and importation. The court held that defendants' conduct in connection with the MSA was entitled to immunity under the *Noerr-Pennington* doctrine. *Id.* at 1192-95. The district court also expressly held that the State defendants did not violate the Interstate Compact Clause of the Constitution by entering into the MSA. *Id.* at 1197-98.

In *A.D. Bedell Wholesale Co., Inc. v. Philip Morris Incorporated,* 104 F. Supp. 2d 501 (W.D. Pa., 2000), the district court dismissed a Sherman Act challenge to the MSA brought by a wholesaler of tobacco products. In dismissing the antitrust claims, the court held that Respondents' conduct in negotiating and executing the MSA "fall[s] within the category of conduct protected by the *Noerr-Pennington* immunity doctrine." *Id.* at 507. The court also held that

antitrust claims based upon the MSA must be dismissed under the state action immunity doctrine of *Parker v. Brown*, 317 U.S. 341 (1943).[11]

In *Forces Action Project v. California*, No. C 99-0607 MJJ, 2000 WL 20977 (N.D. Cal. Jan. 5, 2000), the district court granted defendants' motion to dismiss a constitutional challenge to the MSA. The court held that the plaintiffs lacked standing to bring such claims under Article III of the Constitution. *Id.* at *4. The court further held that the *Noerr-Pennington* doctrine immunized defendants from liability for claims arising out of their negotiation and execution of the MSA. *Id.* at *8. Finally, the court denied plaintiffs' motion for leave to amend the complaint to allege an antitrust claim. Citing the district court's decision in this case, the court held that the relevant precedents "could not be clearer" that indirect purchasers lack standing to bring antitrust damages claims. *Id.* at *9.

In *Table Bluff Reservation v. Philip Morris Incorporated*, No. C 99-2621 MHP (N.D. Cal. Nov. 12, 1999), the district court granted defendants' motion to dismiss a challenge to the MSA brought by a group of American Indian tribes. The court held that the plaintiffs lacked standing, and specifically ruled that they had no standing to challenge the price increases enacted shortly after the MSA. Slip Op. at 9-10.

In sum, the Tenth Circuit's decision in this case is in harmony with every federal court to consider similar

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[11] The *Bedell* court permitted certain antitrust claims against defendant Philip Morris to proceed. These claims were based solely on the alleged conduct of Philip Morris in connection with its acquisition of certain cigarette brands from defendant Liggett, and had nothing to do with the MSA. *See Bedell*, 104 F. Supp. 2d at 508-10.

challenges to the 1998 Master Settlement Agreement. The federal courts have spoken with one voice on these issues, and there is no compelling need for this Court to exercise its supervisory function at this time. The writ should be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

DATED: October 2, 2000

Respectfully submitted,

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and for this purpose only, signing on behalf of Respondents R. J. Reynolds Tobacco Company; Brown & Williamson Tobacco Corporation (individually and as successor by merger to the American Tobacco Company): and Lorillard Tobacco Company.